Supreme Court, U. S.
FILED
MAY 19 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1454

DOLLY CUSKER AKERS,

Petitioner,

vs.

STANLEY HATHAWAY, SECRETARY
OF THE INTERIOR, et.al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

DOLLY CUSKER AKERS,

Petitioner,

vs.

ROGERS C. B. MORTON, SECRETARY
OF THE INTERIOR, et.al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner, Dolly Cusker Akers, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered on June 20, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the Judgment of the United States District Court for the

District of Montana is unreported. The United States Department of the Interior, Office of Hearing and Appeals, Board of Indian Appeals, decision of September 9, 1970 denying modification of the Order determining heirs and affirming the Hearing Examiner's decision of March 7, 1966 is reported at Estate of John J. Akers, IBIA-70-4. Three decisions previous to the aforementioned Decision of September 9 , 1970 and subsequent to March 7, 1966 are: Estate of John J. Akers, IAD-18, February 26, 1968; IAD-18 Supp. June 24, 1968 and the Secretary of the Interiors Opinion of June 1, 1970. Because the judicial and administrative decisions are voluminous and because it is more convenient, these decisions are being provided separately from this petition.

Jurisdiction

The Judgment of the Court of Appeals for the Ninth Circuit was entered on June 20, 1974. This Court has jurisdiction pursuant to 28 U.S.C 1254(1).

Questions Presented

1. Was the evidence sufficient to support the administrative determination that Mr. Akers was competent to execute the December 5, 1957 Will, and thus did not die intestate?

2. Even if Mr. Akers did die testate, is a denial of a dower interest to Mrs. Akers a denial of her rights under the 5th, 9th and 13th Amendments to the U.S. Constitution and the provisions of 42 U.S.C. § 1982?

Constitutional Provisions and Statutes

U.S. Constitution, Amendment 5:

> "No person shall...be deprived of life, liberty, or property without due process of law;..."

U.S. Constitution, Amendment 9:

> "The enumeration, in this constitution, of certain rights, shall not be constued to deny or disparage others retained by the people."

U.S. Constitution, Amendment 13:

> "1. Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction..."

U.S. Constitution, Amendment 14:

> "...No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States;..."

25 U.S.C. § 348

"Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus alloted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or territory where such land is located, and that at the expiration of said period the United States will convy the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract

shall be absolutely null and void: (Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered), except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act; And provided further, That at any time after lands have been allotted to all of the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the Treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and

manner of executing such release shall also be prescribed by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian Tribe shall be held by the United States for the sole purpose of securing homes to actual settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same with interest thereon at 3 per centum per annum, shall be at all

times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office /Bureau of Land Management/, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying /on February 8, 1887/, any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contined shall change or alter any claim of such society for religious or educational purpose heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and

become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever, and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, patents conveying in fee lands to them under the provisions of this Act.

25 U.S.C. § 373

Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or

individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and untill it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: Provided further, That the approval of the will and the death

of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisses, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: Provided also, That sections one and two of this Act /this section and 25 USCS § 372/ shall not apply to the Five Civilized Tribes or the Osage Indians.

42 U.S.C. 1982

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Statement of the Case

Dolly Akers, an Indian person and the widow of John Akers, also an Indian, challenges the determination of the Secretary

of the Interior that her husband's Will disinheriting her was valid and that she had no dower interest in the restricted Indian allotment land that he devised to a third person. Summary Judgment in favor of the Secretary was granted by the United States District Court for the District of Montana and affirmed by the United States Court of Appeals for the Ninth Circuit.

Mr. and Mrs. Akers lived on restricted land in Montana. The land had been acquired with Mrs. Akers; funds, but title was taken solely in Mr. Akers' name. Their ranching and farming enterprise was managed largely by Mrs. Akers during the last several years of Mr. Akers' life because he had become a chronic alcoholic. During the fifteen months before his death in February 1959, Mr. Akers drew three wills, respectively dated December 3, 1957, December 5, 1957, and December 10, 1958. In a proceeding before a hearing officer of the Department of the Interior, Mrs. Akers successfully contested the 1958 will on the ground that Mr. Akers' deterioration from alcoholism rendered him mentally incompetent to execute the will. The December 5, 1957, will was contested before a different hearing examiner. The will was held valid on the examiner's finding that Mr. Akers had executed that will during a lucid interval. The examiner also rejected Mrs. Akers' claim to dower in the restricted land. She exhausted her

administrative remedies and appropriately sought judicial review under the Admini - strative Procedure Act. 5 U.S.C. § § 701-06 of the Secretary's determinations affirming the examiner. (Tooahnippah v. Hickel (1970) 397 U.S. 598.)

Reasons for Granting the Writ

The decision of the Court below raises a substantial issue as to the scope of the Constitution's guarantee of equal protection and due process, as well as Petitioner's rights as an Indian widow under Federal Law. It threatens the security of the Indian widow in the home of a deceased head of a family.

The decision of the Court below has decided the issues in such a way that it is in conflict with applicable decisions of this Court, or at least on a question of importance which has not been, but should be, settled by this Court.

Argument

1. The District Court erred in holding that the Administrative action was supported by substantial evidence.

Examiner McKee's decision that Decedent John Akers was competent on December 5, 1957, is not supported by substantial evidence. Examiner Elge's conclusion

that the Deceased had passed the point of onset of permanent damage to his brain from alcohol "a number of years prior" to the making of the December 10, 1958 will was the basic reasons for her decision that he lacked testimentary capacity at the time of the execution of that will and such a conclusion, based on the testimony of the witnesses, and their demeanor, is contradictory to the conclusion of Examiner McKee in that it encompasses the two prior wills even though Examiner Elge did not finally rule on those two wills.

The District Court has failed to properly take into account the conflicting evidence upon which Examiner Elge based her conclusion, and has given insufficient weight to the fact that Commissioner McKee did not have all the evidence available to him that Examiner Elge did.

A reviewing court cannot uphold a decision merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inverences can be drawn. NLRB v. Pittsburgh S.S. Co. 340 U.S. 498, U.S. L.Ed. 479, 71 S.Ct. 453.

In failing to take into account such contracictory evidence and evidence from which conflicting inferences could be drawn,

the District Court erred in holding that there was substantial evidence to support the decision of the Administrative body.

Dolly Akers contends that deceased John Akers was not competent to make any of the three wills, and therefore, died intestate.

Dolly Akers contends that there was not substantial evidence that Mr. Akers was competent and that therefore summary judgment was, for defendants, improper, and that because there was substantial evidence that Mr. Akers was not competent to make any of the three wills, and that therefore summary judgment should have been granted Dolly Akers on the gounds mentioned. The defendants apparently do not contest the legal proposition that the Indian widow would take under the intestate laws of Montana if the decedent died intestate of restricted Indian property.

2. <u>The District Court erred in holding that the administrative action was not contrary to law, such administrative action being violative of Dolly Akers rights under the law.</u>

Federal law does not prohibit descent and distribution of Indian allotments according to state law.

Under federal statute, the United States holds allotted land:

> "***in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state or territory where such land is located,***" 25 U.S.C. 348.

Federal statute further provides that, subject to the approval of the Secretary of the Interior, an Indian allottee may dispose of his allotment by will during the trust period, or before the issuance of a fee simple patent or the removal of the restrictions. 25 U.S.C. 373.

The federal statute last cited makes no reference to state law, and thus neither directs that state law not be followed, nor prohibits such an approach.

The District Court, in its decision herein, cites the case of <u>Blanset</u> vs. <u>Cardin</u>, 256 U.S. 319 (1921) as authority for the proposition that federal law does not incorporate the state laws limiting the right of a testator to will. Dolly Akers contends that the combined reading

of sections 348 and 373 does lead to the conclusion that state law is, in the proper case, to be looked to.

Further, that case is actually, on its facts, in support of the propositions advanced by Dolly Akers. The Supreme Court in Blanset held that a white man could be disinherited by his Indian wife who willed the property in question to her Indian children and grandchildren. The Court noted that 25 U.S.C. 373 was to:

> "***afford protection to dependant and natural heirs against the waste of the estate as the result of an unfortunate marriage, and enforced inheritance by state law." (at p. 326)

It is submitted that the case at bar, if affirmed, would deny protection to dependant and natural heirs by refusing to look to state law; and that if reversed, would afford protection to dependant and natural heirs.

It is further submitted that the object of the Blanset case was to fulfill a policy towards protection of the Indian woman, and not to avoid state laws. The same policy exists herein, but in furtherance of government policy it is submitted that state law can and should be embraced.

It would be a strange twist of fate in this day of increasing rights of Indians were a case, designed to protect a helpless Indian woman from a white man, to be used to place Indian women on a different level that similarly situated white women.

The justifications used in interpreting 25 U.S.C. 348 are vital to a proper discussion of this case. It has been declared that inasmuch as it was the policy of the government to break up the tribal relations and to bring the Indians under state law as fast as practicable, the policy would be best served by recognizing dower. St. Dennis vs. Breedan, 27 L.D. 312. Do not the same policy reasons apply here?

As the court explained in Wheeler vs. Petitie, 153 F. 471:

> "The general act for the allotment of lands upon Indian reservations *** was to furnish a permanent home, ultimately, for the families of such Indians. The Act of 1887 is in consonance with this idea. Indeed, the allotments were by that Act to be made to the heads of families, and, where so made, of course, there was no allotment to the spouse.

In order, therefore, to carry out the idea of affording a permanent home for the Indian family, there was a purpose, manifestly, to secure the widow in the home of a deceased head of a family by some permanent right. Dower is suited to this purpose. Many of the states and territories, perhaps, most of them, at the time of the adoption of the Act in 1887, had, and have now, statutory regulations respecting dower, so that it may be reasonably inferred that, by the provision of the Act that the allotted lands shall descend according to the laws of the state or territory in which they shall be situated, it was the purpose of Congress that the widow should have her dower in such allotments, and thereby be measurably secured in the permanent family home." (at p. 473)

Thus, in case of intestacy, dower is readily recognized and has sound policy bases. If one accepts the virtue of the policy--security of the widow in the permanent family home by some permanent "right"--how can one conclude that the will of the husband is not also so limited? And what policy is being given

effect instead of the security of the family home to the widow when the whim of a will by the husband is allowed to defeat what was considered to be a permanent right before the stroke of a pen?

Could it be that the reasoning of years ago that all Indians were uneducated and utterly incapable of managing the large amounts of property which they possessed, thus justifying a great degree of federal control over Indian lands is still to be urged as a basis for upholding the decision in the instant case?

It is contended, in any event, that the power that Congress has to regulate Indian affairs does not go beyond what is reasonably essential to their protection, and to be effective, its exercise must not be purely arbitrary, but founded on some reasonable basis. Perrin vs. U.S. 232 U.S. 478, 486 (1914). It is argued that the decision reached by the Secretary to approve the will was arbitrary, capricious and without basis. The will in question should have either been denied or so modified as to take into account the dower interest of Dolly Akers.

The Supreme Court, by way of dicta, has concluded that it is not difficult to "conceive of dispositions so lacking in rational basis that the secretary's approval could reasonably be withheld". Tooahnippah vs.

Hickel, 397 U.S. 598, 90 S.Ct. 1316. The disposition upheld herein, it is submitted, is such a disposition.

Dolly Akers contends that the acts of Defendants herein are racially discriminatory and are in violation of the Thirteenth Amendment to the U.S. Constitution. The badges and incidents of slavery include restraints upon those fundamental rights which are the essence of civil freedom, namely the right to inherit property as is enjoyed by the white citizens. Jones vs. Alfred H. Mayer Co., 392 U.S. 409, 20 L.Ed. 2d 1189, 88 S.Ct. 2186. White women in Montana, if married, have a legal right to dower.

The actions of Defendants are similarly a denial of due process and equal protec - tion of the law under the Fift Amendment to the U.S. Constitution.

It is clear that equal protection of the law is embraced in the Fifth Amendment and that denials of equality to equals can violate that due process clause. United States vs. Petrillo (1947) 332 U.S. 1, 91 L.Ed. 1877, 67 S.Ct. 1538. It is required that a classification be reasonable and be based upon a principle of public policy, and that the statutes and administrative rules establishing such classification be not arbitrary or capricious. A classification for purposes of denying dower rights where a will is involved. It is insufficient to generalize

and say that different treatment of Indians is authorized. At issue is what is the end result.

Dolly Akers further contends that, under the Ninth Amendment to the U.S. Constitution unenumerated rights are retained by the people, and that among these rights is the equitable, moral, natural and legal right in the wife of dower. This fundamental and inherent right, although not mentioned specifically, is not thus to be denied; that right is the basic right of personal security and the right to acquire and enjoy property as your neighbor.

Dolly Akers is further denied her rights under federal statute:

> "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof, to inherit***real*** property." 42 U.S.C. 1982.

Dolly Akers, as an Indian person, is a citizen of the United States, and a citizen of the State of Montana, where she lives. 8 U.S.C. 1401; Deere vs. State of New York, 22 F. 2d 851 (1927). It is unmistakeably clear that if Dolly Akers has no dower rights in Montana-which is a right enjoyed by the white women of Montana to inherit

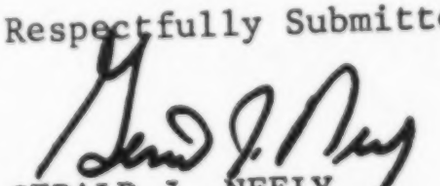
real property--that she does not have the same rights and the above statute is violated.

The District Court did not speak to the above. It held however that the right of dower has no basis in the federal constitution because it is a privilege which government may grant, deny, or limit, citing Ferry vs. Spokane, Pacific & Seattle Railway Co., 258 U.S. 314 (1922). (Record, p. 84). It is submitted, however, that this case relates only to the privileges and immunities clause, Art. 14, Section 2 of the U.S. Constitution, a section not advanced by Dolly Akers.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



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Dated September 18, 1974

A P P E N D I C E S

Opinion of the Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOLLY CUSKER AKERS, Appellant, vs. ROGERS C. B. MORTON, Secretary of the Interior, et al., Appellees.	)	No. 71-3002 O P I N I O N

Appeal From the United States District Court for the District of Montana

Before: HUFSTEDLER and KILKENNY, Circuit Judges, and TAYLOR, District Judge

HUFSTEDLER, Circuit Judge:

Mrs. Akers, an Indian and the widow of John Akers, also an Indian, challenges the determination of the Secretary of the Interior that her husband's will disinheriting her was valid and that she had no dower interest in the restricted Indian allotment

land that he devised to a third person. Summary judgment in favor of the Secretary was granted and she appeals.

Mr. and Mrs. Akers lived on restricted land in Montana. The land had been acquired with Mrs. Akers' funds, but title was taken solely in Mr. Akers' name. 1/ Their ranching and farming enterprise was managed largely by Mrs. Akers during the last several years of Mr. Akers' life because he had become a chronic alcoholic. During the fifteen months before his death in February 1959, Mr. Akers drew three wills, respectively dated December 3, 1957, December 5, 1957, and December 10, 1958. In a proceeding before a hearing officer of the Department of the Interior, Mrs. Akers successfully

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*Hon. Fred Taylor, District of Idaho, sitting by designation.

1. Title in Mrs. Akers under a resulting trust theory was neither asserted in the proceedings before the Secretary or the district court nor argued before this court. We therefore do not address the question of whether the restricted land was properly included in Mr. Akers' estate. (Cf. 25 C.F.R. § 15.32 (1958).)

contested the 1958 will on the ground that Mr. Akers' deterioration from alcoholism rendered him mentally incompetent to execute the will. The December 5, 1957, will was contested before a different hearing examiner. The will was held valid on the examiner's finding that Mr. Akers had executed that will during a lucid interval. The examiner also rejected Mrs. Akers' claim to dower in the restricted land. She exhausted her administrative remedies and appropriately sought judicial review under the Administrative Procedure Act, 5 U.S.C. § § 701-06, of the Secretary's determinations affirming the examiner. (Tooahnippah v. Hickel (1970) 397 U.S. 598.)

Only two of the several issues Mrs. Akers raises on appeal require discussion: (1) the sufficiency of the evidence to support the administrative determination that Mr. Akers was competent to execute the December 5, 1957, will, and (2) Mrs. Akers' claim of the dower in the restricted land.

The evidence on the question of Mr. Akers' mental competency when he executed the will was conflicting. We cannot say that the evidence that he had a lucid interval when he made the will was too insubstantial to support the administrative finding.

Mrs. Akers' assertion of a dower right in the restricted land must also be rejected. Alienation of restricted Indian allotment land is controlled by federal law. Montana's dower law cannot of its own force entitle Mrs. Akers to claim a wife's

interest in her deceased husband's restricted lands. If the relevant federal statute had incorporated Montana law by reference (cf., e.g., 25 U.S.C. § 348), Mrs. Akers could have claimed dower under that federal statute. The governing federal statute, 25 U.S.C. § 373, however, does not refer to state law. Even if Congress had merely failed to exclude local law in this context, Mrs. Akers might have claimed dower (see Blundell v. Wallace (1925) 267 U.S. 373, 376), but section 373 manifests an intent to exclude local law. (Id. at 377; Blanset v. Cardin (1921) 256 U.S. 319.) The sole limit on an Indian testator's freedom to devise restricted lands is the power vested in the Secretary of the Interior to disapprove wills devising restricted property.

Because each of the specific findings made by the Secretary in this case was amply supported in the record before him, Mrs. Akers can successfully challenge his decision only if he failed to exercise fully the discretion given him by the statute. If the Secretary's discretion were broad enough to allow him to disapprove Mr. Akers' will because the will violated the principles of public policy that prompted Montana to enact its dower law, we would remand to the Secretary for an exercise of that discretion, for the Secretary did not exercise

discretion in this regard.[2/] The Supreme Court, however, has substantially limited the Secretary's discretion under section 373. The Secretary may disapprove a will only if it is technically deficient or if it is irrational. Where, as in this case, it is rational to disinherit a disfavored relative in preference to a more distant but more favored relative, the Supreme Court has indicated that the Secretary is not free to disapprove the will merely on notions of fairness or equity. (Tooahnippah v. Hickel, supra, 397 U.S. at 610). In Tooahnippah, the Court reversed the Secretary's disapproval of a will disinheriting a duaghter with whom the father had had little contact in favor of a niece with whom the testator had lived. The Secretary's approval of Mr. Akers' will is unassailable, for the Secretary upon adequate evidence has exhausted the discretion thus given to him.

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2. The Secretary concluded that the will was not unjust or unnatural because there was evidence of disharmony between husband and wife in the later years of their marriage. While the evidence suggests that the disposition directed by the will was rational, it is irrelevant to a determination of whether, even if rational, such a disposition should be disapproved because it is contrary to public policy.

Although the Blanset and Tooahnippah cases require us to affirm the judgment in the Secretary's favor, we cannot in good conscience do so without expressing our dissatisfaction with this state of the law. Congress' overriding purposes in enacting the General Allotment Act of 1887 (25 U.S.C. § 331, as amended) were to protect the Indians' interests in restricted land and to provide Indian allottees and their families with permanent homes. (E.g., Hopkins v. United States (9th Cir. 1969) 414 F.2d 464; Wheeler v. Petite (D. Ore. 1907) 153 F. 471; Parr v. United States (D. Ore. 1907) 153 F. 462; cf. Squire v. Capoeman (1956) 351 U.S. 1.)[3/]

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3. "[O]ne of [the] main purposes [of the general allotment act] was to furnish a permanent home, ultimately, for the families of such Indians . . . . In order, therefore, to carry out the idea of affording a permanent home for the Indian family, there was a purpose, manifestly, to secure the widow in the home of a deceased head of a family by some permanent right. Dower is suited to this purpose." Wheeler v. Petite, supra, 153 F. at 473.

"The interpretation I have given to the act, construed in connection with the treaty, seems more in consonance with the intendment of Congress and the expectations and anticipations of the Indians. It secures, as was stipulated in the treaty of 1855, to the family, in case of the death of the head thereof, the possession and enjoyment of the permanent home and the improvements thereon. Otherwise, it

[fn cont'd next page]

The policy has been consistently implemented by recognizing that dower and curtesy rights, existing understate law, apply to allotment lands held by the deceased allottee upon his or her death intestate. (Wheeler v. Petite, supra; Parr v. United States, supra; "Dower Rights in Restricted Indian Estates" (1954) 61 Interior Dec. 307 (Solicitor's opinion reaffirming right to dower in Montana allotments passing by intestate succession); St. Dennis v. Breedan (1898) 27 Interior Dec. 312 (curtesy); Harrison McCauley (1898) 27 Interior Dec. 399 (dower).)

In Blanset v. Cardin, supra, 256 U.S. 319, a non-Indian widower claimed that his Indian wife's will devising all of her allotment lands to her

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[fn 3 cont'd]

might happen that the wife of a deceased allottee or the husband of such an allottee, would be left without any estate whatsoever in any of the Indian lands upon the reservation . . . . So at the death of the husband the wife is left without the benefit of any allotment, unless she is to have her dower, which will secure to her the measurable possession and enjoyment of the permanent home. Otherwise, she is left homeless and remediless, dependent wholly upon the charity of relatives and friends, with the government discharged of its guardianship." Parr v. United States, supra, 153 F. at 470-71.

The paternalism that characterizes the Allotment Act undoubtedly now offends many Indians and non-Indians, but we are free neither to rewrite history nor to redraft the Act to conform to our notions of contemporary social attitudes.

[end fn 3]

children and grandchildren was void to the extent that it deprived him of a one-third interest in her lands under Oklahoma law. In rejecting his claim, the Supreme Court explained that nonrecognition of the state law fulfilled Congress' purpose in enacting section 373, which was "to afford 'protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforced inheritance by state laws.'" (256 U.S. at 326) The Court exhibited no awareness that the Blanset rule, erasing state law protecting a spouse from disinheritance, would also deprive an Indian widow or widower of any share of allotment land if the allottee devised all of the land to a third person, Indian or non-Indian, free from state or federal restrictions. Perhaps, the Court assumed that the Secretary under section 373 had the power to protect a disinherited Indian spouse by disapproving a will that devised all of the allotment land to others. That assumption, if ever it existed, did not survive Tooahnippah v. Hickel, supra, 397 U.S. 598, which limited the Secretary's discretion to evaluation of the technical validity of the will and the rationality of the decedent's testamentary scheme. 4/

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4. According to Mr. Justice Harlan, specially concurring, the Secretary might have a greater area of discretion if he acted pursuant to promulgated regulations. (Id. at 619). No regulations relevant to the issue in this case have been promulgated.

Together Blanset and Tooahnippah produce the anomalous result that an Indian's devise of restricted lands is less restricted than an Indian's (or a non-Indian's) devise of any other realty. He or she can will that property free from any state law designed to protect a surviving spouse, and there is no federal law that fills that state law gap. Although we cannot reconcile the result with the public policy expressed by state law establishing dower and curtesy rights or with the congressional intent to provide family homes for Indian allottees and their dependents, we are unable to avoid it. The anomaly will persist until the Supreme Court reconsiders Blanset and Tooahnippah, the Secretary writes appropriate regulations, or Congress amends section 373 by eliminating all federal restrictions on the testamentary disposition of allotment lands, leaving the dispositions to be controlled by state law (cf. Blundell v. Wallace, supra), or imposes some federal scheme protecting from disinheritance the spouses of Indian allottees.

AFFIRMED.

Opinion of the United States District Court for the District of Montana, Billings Division

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

DOLLY CUSKER AKERS, Plaintiff, -vs- ROGERS C. B. MORTON, Secretary of the Interior, et. al., Defendants.	)	Civil No. 907
	)	OPINION AND ORDER

By this action the Plaintiff, Dolly Cusker Akers, widow of John J. Akers, seeks to review the action of the Secretary of the Interior in distributing the trust estate of John J. Akers. The action of the Secretary is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701. Tooahnippah v. Hickel, 397 U.S. 598 (1970). The scope of the review is provided by 5 U.S.C. § 706.

On this review the Court does not hear the matter de novo. It is limited to a review based on

the record made in the administrative proceeding. Coleman v. United States, 363 F. 2d 190 (9th Cir. 1966); Couch v. Udall, 265 F. Supp. 848 (W.D. Okla. 1967). Only if the administrative action is unsupported by substantial evidence or is contrary to law may the decision be set aside.

Following a hearing Inheritance Examiner Elge found that John J. Akers was incompetent to execute the will of December 10, 1958. The case was transferred to Inheritance Examiner McKee. He held that on December 5, 1957, the testator was competent, approved the will of that date, denied Plaintiff's claim to dower and distributed the trust estate in accordance with the terms of the will.

John J. Akers died on February 19, 1959. He had executed three wills dated respectively December 3, 1957, December 5, 1957, and December 10, 1958. At the time of his death John J. Akers was an allotee of land held in trust for him by the United States. The controlling statute is 25 U.S.C. § 373 reading in pertinent part:

> Any person....having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation... shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with

> regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator . . . .

After the denial of a petition for rehearing, an appeal was taken to the Regional Solicitor of the Department of the Interior, the officer authorized to make the final decision on behalf of the Secretary. He dismissed the appeal and affirmed the order denying the petition for rehearing.

Plaintiff claimed that the decedent was incompetent to make a will, that the case should not have been transferred from Examiner Elge to Examiner McKee, that Examiner Elge's findings were conclusive, and that in any event Plaintiff, as a widow, was entitled to dower under Montana Law. R.C.M. 1947 § 22-101.

No point would be served by an elaborate review of the evidence. There was evidence that John J. Akers was an alcoholic and that he suffered long periods of incompetence; however, the testimony of the subscribing witnesses was to the effect that on December 5, 1957, when the will was executed, testator was sober and understood what he was doing.

There was evidence that on December 3, 1957, decedent was sober and rational. Other evidence, if believed, was sufficient to prove that testator did have sober moments and that when sober he was rational . It cannot be said that this evidence was unsubstantial.

Plaintiff cites no authority for the proposition that the case should not have been transferred to Examiner McKee. There is no indication that there was any improper motivation for the transfer. Rather it appears that the reservation out of which this case arose had been assigned to Examiner McKee and that this case fell to him as a part of that assignment. What happened here commonly happens in the United States District Courts. Different judges preside over the separate parts of a single case. No reason appears why an administrative agency should enjoy less flexibility.

Examiner Elge's findings as to the 1958 will did not bind Examiner McKee. In April 1964, following an extensive hearing, Examiner Elge found among other things:

> The evidence considered as a whole is preponderant that John Akers lacked testamentary capacity at the time of exectuion of said purported last will and testament of December 10, 1958. He had passed the point of onset of permanent damage to his brain from alcohol a number of years prior to the making of said purported last will and, at the

time of its execution, lacked that mental capacity to meet the test of a sound and disposing mind.

In her order, however, the following appears:

> This order is not dispositive of the decedent's estate and is not a final order, there being earlier wills extant. At such time as a final order shall have been issued, a petition for rehearing may include this ruling on said purported will of December 10, 1958, as well as any matters contained in said final order.
>
> This case be and the same hereby is transferred to Examiner of Inheritance David J. McKee, whose assigned agencies include Fort Peck, for appropriate proceedings in connection with prior wills and final disposition.

It may be, although that problem is not reached, that one examiner could not overturn a ruling made by a prvious examiner. That was not done here. Examiner Elge specifically confined her order to the December 10, 1958, will, without deciding the problem posed by the existence of prior wills. While the evidence bearing on wills executed a year apart may overlap and did here, the issues as to validity are separate. Here the finding did not purport to reach testator's competence at any time other than December 10, 1958. Examiner Elge did find that testator had passed the point of onset

of permanent brain damage a number of years prior to 1958, and that may be, but there is no finding that that permanent damage was of sufficient severity to render testator incapable of rational interludes in 1957. The witnesses who testified that decedent was incompetent in 1958 considered events arising after December 5, 1957, as did Examiner Elge in making her findings of incompetency. Examiner McKee had (contrary to the assertions in Plaintiff's brief) before him evidence which was not presented to Examiner Elge, including the testimony of the subscribing witnesses to the wills of December 3 and December 5, 1957. In short, Examiner McKee decided a different issue on different evidence.

The Secretary properly denied Plaintiff's claim of a dower right in the alloted lands. Dower is a product of two things: a law which creates or recognizes it and a marriage contract. The law of Montana, except as the same is adopted by Congress as the law of the United States, does not apply to trust patent lands. The Montana Enabling Act (25 Stat. 676, § 4) provides in part:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by

> the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . .

See U.S. v. McIntire, 101 F.2d 650 (9th Cir. 1939).

The Federal law does not incorporate the state laws limiting the right of a testator to will. Thus in Blonset v. Cardin;, 256 U.S. 319 (1921) it is said:

> Our conclusion is the same as that of the Court of Appeals, 'that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.'

The right of dower has no basis in the Federal Constitution. It is a privilege which the state may grant, deny, or limit. It is not a part of the privileges of citizenship. Ferry v. Spokane, Pacific & Seattle Railway Co., 258 U.S. 314 (1922).

Since there is no federal law of dower there was no law in existence which at the time of Plaintiff's marriage or at the time of her husband's death invested her with any rights of dower.

Since Plaintiff was deprived of no right, all that remains is a rather nebulous argument that some federal constitutional rights (presumably in the nature of equal protection -- plaintiff cites the Fifth, Ninth, and Thirteenth Amendments) were denied plaintiff because the United States did not treat her with respect to her husband's trust lands as the State of Montana treats other widows. If the argument is not answered by the fact that it is only because of John J. Akers' special treatment as an Indian that he had allotments and that non-Indian husbands do not have trust lands to which dower could attach, it is only necessary to say that the United States in dealing with Indians and Indian lands is not required to conform its laws to the laws of the states wherein the reservations lie and thus equate trust patent Indians in all aspects with other citizens of the state. The concept of the tribe as a sovereign with power to make and administer law (see Calliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Glover v. U.S., 219 F. Supp. 19 (D. Mont. 1963)) coupled with the concept that the United States is a trustee for the individual Indian ward (see Board of County Commissioners v. Seber, 318 U.S. 705 (1943); Squire v. Capoemon, 351 U.S. 1 (1956)) would be sufficient to create a legitimate basis for classification were there otherwise some equal protection problem.

The motion for summary judgment is granted, all restraining orders or injunctions now in effect are dissolved, and it is ordered that Plaintiff be denied all relief.

DATED this 17th day of September, 1971.

/s/ Russell E. Smith
Russell E. Smith
United States District Judge

Opinion of the Director, Office of
Hearing and Appeals, Board
of Indian Appeals

UNITED STATES DEPARTMENT OF THE
INTERIOR
Office of Hearings and Appeals
Board of In an Appeals
Washington, D.C. 20240

Estate of John J. Akers :	IBIA-70-4
Deceased Fort Peck Indian:	Probate No. K-63-66
Allottee No. 1921 :	Decision on Request for
:	Modification of the Order
	Determining Heirs

Dolly C. Akers, by and through her attorneys, has appealed five times to the Secretary of the Interior from a decision of a Hearing Examiner, dated March 7, 1966, approving the will of her late husband, John J. Akers. In her last two petitions, the appellant has presented no new issues of law or fact. Ordinarily, this alone would be dispositive of this appeal. Notwithstanding, this brief opinion is being rendered in order to clarify the difference in the law pertaining to rights of dower and curtesy as it applies to the estate of an Indian who dies testate leaving restricted Indian lands and one who dies intestate; and to make plain the authority of the Secretary of the Interior and the Board of Indian Appeals in probate matters.

It is not necessary that we review all the facts at this time as they have been aptly stated in three previous decisions. See Estate of John J. Akers, IA D-18 February 26, 1968, IA D-18 Supp. June 24, 1968, and the Secretary's Opinion of June 1, 1970. In essence, Mrs. Akers claims she is entitled to a dower interest in her husband's estate even though he clearly chose to exclude her from taking under his will which provides:

> "Third: That I hereby give and bequeath unto my wife, Dolly C. Akers, the sum, and only the sum, of One Dollar ($1.00), it being my intention and desire to hereby limit the inheritance rights of my said wife to the said sum of One Dollar ($1.00) in the estate of which I die seized or possessed."

As authority for her claim, the appellant erroneously cites a departmental ruling recognizing dower in cases where an Indian dies without a will and his restricted Indian property is passed under the intestate laws of the State. Solicitor's Opinio 61 I.D. 307 (1954) Dower and curtesy are implied incidents of estates of inheritance and have always been treated by the Department as being part of the interests acquired as the result of the intestate distribution of restricted Indian lands.

On the other hand, when an Indian disposes of trust property by a will made pursuant to 25 U.S.C

373, State laws which impose dower, curtesy or other limitations on the property which a testator may devise do not apply. The Act of Congress of February 14, 1913, (37 Stat. 678; 25 U.S.C. 373) was designed to give Indians the right to dispose of property by will free of State restrictions. The Supreme Court ruled that an Oklahoma Statute limiting the disposition of property by will does not apply to restricted Indian lands and held, "that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this Act of Congress, free from restrictions on the part of the state as to the portions to be conveyed or as to the objects of the testator's bounty." Blanset v. Cardin, 256 U.S. 319 (1921).

Once again, the appellant has requested the Secretary to exercise his discretionary authority and overturn the wish of the decedent, expressed in a duly executed and approved will, that his wife should not share in the distribution of his restricted property. Despite the intent of the Act of 1913, the appellant argues that the Department's ruling is manifestly unjust and works a hardship on her, and that the Secretary, in his discretion may recognize her dower interest under the principles of equity. While the Secretary has wide discretionary powers , he cannot and should not disapprove an Indian's will simply because the Secretary may believe that the disposition of the estate was not "just and equitable. This would be tantamount to holding that the Secretary could substitute his preference for that of an Indian testator. Tooahnippah v. Hickel, 397 U.S. 598 (1970).

The fact that the appellant has made five appeals raises a serious question. Does an appellant have a right to have a case reconsidered after a final decision has been rendered by the Secretary or his delegate? The case in hand was first reviewed by the Secretary in 1968. Since then, the appellant has appealed, by petition for reconsideration or otherwise, on four different occasions. Each time, Mrs. Akers has failed to show any error and her last two petitions have alleged no new facts or issues. Although there is no regulation that provides the Secretary with authority to reconsider his decision approving or disapproving an examiner's decision, he has the inherent right to do so on newly discovered evidence or fraud. Estate of Ute, IA-143 (1955). However, if the petition for reconsideration merely reiterates arguments made on appeal, no consideration shall be given to the petition. Estate of Sarah Bruner, IA-2 (1950).

Under the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, it is determined that this matter has been properly conducted, decided and reviewed and this decision is final for the Department. 35 F.R. 12081.

The Appellant's request for modification of the order determining heirs is denied and the Hearing Examiner's decision of March 7, 1966, is affirmed

/s/ James M. Day
James M. Day, Director
Office of Hearings and Appeals
and Member of the Board of
Indian Appeals

Decided:
September 9, 1970

Opinion of the Assistant
Secretary of the Interior

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20242

June 1, 1970

Gentlemen:

On March 28, 1969, and June 12, 1969, you submitted a petition and supplemental petition on behalf of your client, Mrs. Dolly Custer (sic) Akers, requesting certain modifications in this Department's determination in Probate Case No. K-63-66, concerning the estate of Mrs. Akers' husband, John J. Akers, deceased Fort Peck Allottee No. 1921. Specifically you requested that the order issued by Inheritance Examiner David J. McKee, approving a will executed by John Akers on December 5, 1957, be amended to grant Mrs. Akers her "rightful share " in the estate. In light of your petition, even though all formal appeal rights have been exhausted, we have taken the unusual step of reviewing the entire record de novo. The results of that review are contained herein.

I.

Probate Case #K-63-66 was first submitted to this Department on February 20, 1959, the day after John Akers' death, by the proponents of a will he had executed on December 10, 1958, which purported to devise all his Indian trust property to his sister, Mrs. Hazel R. Trinder, and leave his

wife, Dolly Custer (sic) Akers, the sum of one dollar. Formal consideration of the will, whose approval was opposed by Mrs. Akers, was begun shortly thereafter by Inheritance Examiner Frances Elge and lasted for almost six years. Following extensive proceedings in Poplar, Billings, and Helena, Montana, during which over 30 witnesses offered voluminous testimony and depositions, an Interim Order was issued on April 28, 1964, in which Examiner Elge disapproved the 1958 will because, she found, John Akers lacked the requisite testamentary capacity at the time of its execution.

In her Interim Order Examiner Elge also transferred the case to Examiner David J. McKee for appropriate proceedings in connection with two earlier wills John Akers had executed on December 3 and 5, 1957. In the interest of time and efficiency, the parties stipulated that Examiner McKee could consider the entire record of the proceedings held before Examiner Elge. On June 22, 1964, a supplemental hearing was held in Poplar, Montana, for the taking of any new or additional evidence bearing upon the 1957 wills.

Examiner McKee issued his findings on March 7, 1966, in an order which approved the December 5, 1957, will and determined that as residuary devisee under the will, Hazel R. Trinder was entitled to all the lands and accrued monies remaining in John Akers' estate after payment of the probate fees. Allegations by Mrs. Akers that her husband lacked testamentary capacity at the time he executed the will and had been unduly influenced by his mother were specifically rejected. A claim filed against the estate by the United States Internal Revenue Service was also rejected.

Petitions for rehearing filed by Mrs. Akers and the Internal Revenue Service were both denied on March 6, 1967. That denial was reviewed on appeal by the Regional Solicitor, Denver, who dismissed Mrs. Akers' appeal and remanded the case for hearing solely on the question of the Internal Revenue Service claim. An Order After Rehearing, issued on June 24, 1968, allowed the Internal Revenue Service claim and rejected still another challenge to the validity of the will by Mrs. Akers. A second appeal was then filed with the Regional Solicitor, Denver, who once again affirmed the approval of the December 5, 1957, will.

On October 10, 1968, Mrs. Akers petitioned to remove certain property, primarily buildings and improvements located on the Akers' farm, from her husband's estate, claiming that it originally had been her property. That petition was denied on October 16, 1968, in a Supplemental Order which noted that even if the property in question had once belonged to her, it had become part of the trust estate. A similar petition was also rejected on November 27, 1968, by the Bureau of Indian Affairs' Area Director in Billings, Montana, who noted that the matter had already been heard and properly decided.

On February 20, 1969, Examiner McKee issued an order fixing attorney fees and establishing the priority of claims against the estate. Actual distribution of the estate has been withheld, however, pending the outcome of this review.

These facts, which represent only the highlights of the record, were obtained in the course of a

careful review of all the proceedings in the case. This review gave particular attention to the issues raised in your reports for modification of Hearing Examiner McKee's orders.

II.

In essence, two alternative legal arguments for granting Mrs. Akers a share in her husband's estate have been offered. The first asserts that all three wills left at the time of John Akers' death are invalid, having been executed when he lacked testamentary capacity and that his widow is entitled to his entire estate under the law governing intestate succession. The second contends that even if the December 5, 1957, will is valid, Mrs. Akers is still entitled to her dower share in the estate.

A.

With regard to the question of John Akers' testamentary capacity, we note initially that the sole concern must be whether he was capable of executing a will at the time he actually did so. See Estate of Isaac Maynard Broncheau (Bronche), Deceased, Unallotted Nez Perce Indian, 61 I.D. 139 (1953).

Since there appears to be no dispute with the finding that John Akers lacked testamentary capacity when he executed his last will on December 10, 1958, we shall turn our attention to his second will, executed approximately a year earlier on December 5, 1957.

The record contains considerable testimony as well as lengthy depositions and answers to written interrogatories regarding John Akers' physical and mental condition during the later part of his life, some of which, particularly that offered by physicians, is conflicting. It does appear that there were times, both before and after December 5, 1957, in addition to December 10, 1958, when John Akers may have lacked testamentary capacity. Yet, there is persuasive evidence that on December 5, 1957, he was fully qualified to execute a will. We note particularly the testimony of John O. Garden, the attorney who prepared and witnessed the will. Mr. Garden testified that John Akers had come to his office for the first time several days prior to December 5, 1957, with notes regarding the manner in which he wished to dispose of his property and asked Garden to prepare a will reflecting certain disposal of his property; that he had returned to Garden's office on the day the will was to be ready, December 5, 1957; that he had then discussed at some length the matter of disinheriting his wife and appeared to understand Mr. Garden's explanation of the law involved; and that he seemed well aware of the nature of his act when he actually executed the document Garden had prepared. Mrs. Pauline Garden, the second witness to the will also testified to the decedent's condition, concurring in the conclusion that he appeared fully competent.

In an effort to sustain her contention that her husband lacked testamentary capacity, Mrs. Akers introduced evidence that he suffered from certain

physical disabilities, primarily chronic alcoholism during the later years of his life. However, we do not believe that evidence is sufficient to rebut the prima facie case made by the attesting witnesses in favor of the will, especially since the Gardens' testimony was supported by that of the others, including physicians, whose testimony indicated that there were intervals during 1956, 1957, and 1958 when John Akers appeared lucid and in full command of his faculties.

The statement contained in Examiner Elge's Interim Order that John Akers "had passed the point of onset of permanent damage to his brain from alcohol a number of years prior to the making of the (December 10, 1958) will" does not preclude a finding that he was capable of executing a will on December 5, 1957, since her statement was merely dictum in an opinion concerned only with his status over a year later. That she did not decide whether John Akers had testamentary capacity on December 5, 1957, is apparent from the fact that she transferred the case to Examiner McKee "for appropriate proceedings in connection with prior wills and final disposition."

In light of the foregoing, we find no reason to modify the finding of Examiner McKee that John Akers duly executed a will on December 5, 1957, a finding which has been reviewed and affirmed on at least five other occasions. Since John Akers left a valid will at the time of his death, distribution of his estate must be governed by the provisions of that will and not by the law of succession.

B.

We turn now to the contention that even if the December 5, 1957, will is valid, Mrs. Akers still retains dower rights in her husband's estate. Congress has placed approval of Indian wills purporting to devise interests in Indian trust on restricted property exclusively in the hands of the Secretary of the Interior by providing that an Indian may dispose of trust property by will provided such wills receive Secretarial approval. 36 Stat. 856; 25 U.S.C. 373.

State laws which impose limitations on the extent of the property which a testator may devise or with regard to the objects of his bounty are not applicable to wills made pursuant to 25 U.S.C. 373. See Blanset v. Cardin, 256 U.S. 319 (1921): Homovich v. Chapman, 191 F.2d 761 (D.C. Cir., 1951). Thus, dower and curtesy are inapplicable to restricted Indian property devised or bequeathed under such wills. The situation is different with respect to restricted Indian property which passes under the intestate laws of a state. Since dower and curtesy are implied incidents of estates of inheritance, they have always been treated by the Department as being part of the interests acquired as the result of the intestate distribution of restricted Indian lands. Solicitor's Opinion, 61 I.D. 307 (1954).

John Akers clearly chose to exclude his wife from taking under his will. He evidenced a consistent desire to disinherit her in each and every will he executed. Testimony offered by the attorney who drew up the December 5, 1957, will indicates that the legal implications of his action were fully discussed

and understood.

The will provides:

> "Third: That I hereby give and bequeath unto my wife, Dolly C. Akers, the sum, and only the sum of One Dollar ($1.00), it being my intention and desire to hereby limit the inheritance rights of my said wife to the said sum of One Dollar ($1.00) in the estate of which I die seized or possessed."

That provision does not appear patently unjust or unnatural in light of the record which shows that John and Dolly Akers lived apart for extended periods of times; that John Akers consulted attorneys on at least two occasions regarding divorce proceedings, and that at the time of his death such proceedings had actually been initiated.

Nor is it correct to conclude that Dolly Akers would have shared in John Akers' restricted Indian property had he lived long enough for there to have been a divorce. In the absence of a Federal statute to the contrary, the courts do not have jurisdiction to determine title to restricted Indian property. McKay v. Kalyton, 204 U.S. 458 (1907). As there is no legislation, for title purposes, subjecting the restricted Indian property in question to the jurisdiction of the state courts, Dolly Akers could have acquired interests in it through divorce proceedings only if John Akers had executed appropriate

instruments and they were approved by the Secretary of the Interior or his authorized representative.

In sum, there is no basis for defeating the wish of the decedent as expressed in his duly executed and approved will that his wofe not share to any extent in the distribution of his restricted Indian estate. As the Supreme Court of the United States held on April 27, 1970, the Secretary of the Interior may not disapprove an Indian's will simply because the Secretary may have a different view from the Indian testator of what an equitable distribution of his restricted Indian estate is. Julia Tooahmippah (Goombie), et al. v. Walter J. Hickel, Secretary of the Interior, et al., No. 300.

III.

In our review of the proceedings in this case we have been concerned not only with the two legal arguments explicitly raised in Mrs. Akers' behalf but also with any other possible legal or equitable issues. Having considered the entire record at length, we are convinced that the Probate Case #K-63-66 was properly conducted, decided, and reviewed.

Consequently, your request that the final Departmental determination be modified is hereby denied.

A copy of this letter is being sent to the Superintendent of the Fort Peck Indian Agency and will constitute the estate of John Akers in accordance with the final orders entered by Hearing Examiner

David J. McKee.

Sincerely yours,

/s/ Harrison Loesch

Assistant Secretary of
the Interior

Supreme Court, U. S.
FILED
JUL 14 1975
MICHAEL RODAK, JR., CLERK

No. 74-1454

In the Supreme Court of the United States

OCTOBER TERM, 1975

DOLLY CUSKER AKERS, PETITIONER

v.

STANLEY K. HATHAWAY,
SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1454

DOLLY CUSKER AKERS, PETITIONER

v.

STANLEY K. HATHAWAY,
SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

We invite the Court's attention to the following facts which show that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals, a copy of which we have attached as an appendix to this memorandum, was entered on June 20, 1974. The time for filing a petition for a writ of certiorari was not extended, and, accordingly, the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on September 18, 1974. The petition was filed on May 19, 1975. Petitioner had previously submitted a petition to this Court on September 24, 1974, followed by a supplement to the petition, both of which were also out of time and were returned by the Clerk. Since the time limit specified by 28 U.S.C. 2101(c) is jurisdictional, the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JUDGMENT

No. 71-3002

DOLLY CUSKER AKERS,

Appellant

v.

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA (Billings)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered June 20, 1974